No. 18-457

IN THE

# Supreme Court of the United States

NORTH CAROLINA DEPARTMENT OF REVENUE,
*Petitioner,*

v.

THE KIMBERLY RICE KAESTNER 1992 FAMILY TRUST,
*Respondent.*

**On Petition for *Writ of Certiorari* to the Supreme Court of North Carolina**

## BRIEF *AMICUS CURIAE* OF COUNCIL ON STATE TAXATION IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICUS CURIAE*

The Council On State Taxation ("COST") is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce. Today COST has grown to an independent membership of approximately 550 major corporations engaged in interstate and international business.[1] COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities.

COST members often have limited presence in a state and what constitutes sufficient "minimum contacts," *see Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992) citing *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954) and *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), for a state to assert jurisdiction over a taxpayer not domiciled in the state is of upmost importance. An important part of an equitable and nondiscriminatory tax system is predictability and stability. Taxpayers, as well as state and local governments seeking revenue from the taxes and fees they impose, need clear guidance from the Court as to when taxpayers not domiciled in a state can be subject to state and local taxation under the U.S. Constitution's Due Process Clause.[2]

COST has a history of submitting *amicus* briefs to this Court when it considers state and local tax issues.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. Both parties provided blanket consent to file *amicus curiae* briefs with the Clerk of this Court.

[2] U.S. Const. amend. XIV.

Most recently, COST submitted *amicus* briefs in three significant state tax cases decided by the Court during the 2014 term: *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015); *Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136 (2015); and *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124 (2015). Further, COST regularly submits *amicus* briefs at the petition phase before this Court. *See, e.g.*, *Nextel Communications of the Mid-Atlantic, Inc. v. Commonwealth of Pennsylvania, Dep't of Rev.*, 171 A.3d 682 (Pa. 2017), *cert. denied* 138 S. Ct. 2635 (2018) and *Gillette Commercial Operations N. Am. & Subsidiaries v. Dep't of Treasury*, 878 N.W.2d 891 (Mich. Ct. App. 2015), *appl. for leave to appeal denied*, 880 N.W.2d. 230 (Mich. 2016), *cert. denied*, 137 S. Ct. 2157 (2017). As a long-standing representative of large multijurisdictional taxpayers, COST is uniquely positioned to provide this Court with background information and reasons why state tax systems need structure to ensure they are fair and pass muster under the U.S. Constitution's Due Process Clause. COST members have significant activities and operations in all fifty states and are directly impacted when a state court fails to correctly apply the principles required by this Court's Due Process Clause decisions.

## SUMMARY OF THE ARGUMENT

The importance of this case for all taxpayers has been heightened by this Court's recent decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). As the majority of the Court noted, "[w]hen considering whether a State may levy a tax, Due Process and Commerce Clause standards may not be identical or coterminous, but there are significant parallels." *Id.* at 2093. This Court in *Wayfair* specifically determined

that the physical presence standard had outlived its usefulness for determining substantial nexus under the Commerce Clause for sales and use tax purposes and replaced the physical presence test with an economic and virtual presence standard. *Id.* at 2099. Although the Court noted that certain features of South Dakota's laws (*i.e.*, threshold requirements, no retroactive application and South Dakota's participation in the Streamlined Sales and Use Tax Agreement) would satisfy substantial nexus under the Commerce Clause, the Court did not opine on what specific in-state activities or contacts are sufficient to meet the Due Process Clause requirements. Further, the Court specifically noted in *Wayfair* that relief for *de minimis* contacts was an issue not before it in that case. *Id.* at 2099. As a result, this case provides the ideal opportunity for the Court to clarify what contacts are, or are not, sufficient to meet the Due Process Clause's "minimum connections" requirement. This Court can assist both taxpayers and state and local governments by providing guidance on what contacts an entity must have with a state or locality to be sufficient (or not sufficient) for the government to assert its taxing authority.

The jurisdiction of a state or locality to impose a tax should be constrained by whether an entity is domiciled in such state or locality. *Amicus* will highlight the differences between domiciled and non-domiciled entities and why this distinction is important. An entity domiciled in a state would be subject to that government's general taxing powers versus a non-domiciled entity that is merely doing business in that jurisdiction, which may be subject only to the specific taxing

powers of the government.[3] This Court's articulation of a clear line of authority for a state to impose its taxing powers based on the state having general tax jurisdiction versus specific tax jurisdiction would benefit taxpayers and the state and local taxing jurisdictions alike, providing clear guidance on the Due Process Clause limits on state and local governments to impose taxes and raise revenue.

Fortunately, this Court in 2011 and 2014 issued four decisions that provided guidance on the Due Process Clause that are instructive. *Amicus* will address these four significant cases below, which include: *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011), *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), *Daimler AG v. Bauman*, 571 U.S. 117 (2014), and *Walden v. Fiore*, 571 U.S. 277 (2014). These cases provide a framework that addresses not only the issue directly before the Court—when can a state impose an income tax on a trust—but can also provide comprehensive guidance as to the Due Process Clause limitations on state imposition of other types of taxes where an entity is not domiciled in the state.

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[3] Addressing jurisdictional issues post-*Wayfair*, *see* Walter Hellerstein and Andrew Appleby, *Substantive and Enforcement Jurisdiction in a Post-Wayfair World*, 90 State Tax Notes 283 (2018).

## ARGUMENT

### I. THE DUE PROCESS CLAUSE REQUIRES DIFFERENT STANDARDS FOR IMPOSING TAX BASED ON GENERAL JURISDICTION VERSUS SPECIFIC JURISDICTION.

An entity, whether an individual, partnership, or a corporation can be subject to various taxes in multiple locations; however, an entity should not be subject to all the taxes of a specific jurisdiction without any limitation.[4] The ability of a jurisdiction to impose the full extent of its taxing authority upon an entity is similar to a state having "general jurisdiction" over an entity for purposes of being subject to litigation within the state. This Court has addressed the issue of general jurisdiction for these purposes on numerous occasions and has determined those cases are relevant for purposes of determining when an entity has a sufficient connection with a taxing jurisdiction for purposes of the Due Process Clause. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

General jurisdiction for taxes should follow the location where an entity is domiciled. For example, an individual or other entity engaged in business in ten states should only be subject to the general taxing authority of the state or locality in which the individual or entity is personally or commercially domiciled. That state, and that state alone, is the only jurisdiction that can impose its taxes on such an entity,

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[4] While it may appear difficult to determine the domicile for some types of entities, the Court provided guidance on where a corporation is domiciled in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

regardless of whether the activity directly occurred in the state.

However, a state with general jurisdiction is constrained as to how it can tax non-domiciliary entities that are not subject to the state's general jurisdiction. The state's tax scheme must be consistent and cannot be structured in a way that subjects a taxpayer's income to tax more than once if every other state imposed a similar tax. *See Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787 (2015).[5] In *Wynne*, the state law failed to give full credit for similar taxes the taxpayer paid to other states.

A state (or local jurisdiction) where an entity is not domiciled may also be able to impose a specific tax on that entity, but only if the entity's activities conducted in the taxing state rise to a level sufficient to meet the standards of the Due Process Clause (*i.e.*, specific jurisdiction). To illustrate this, consider a state's corporate income tax. States are required to allow an entity to apportion the business income earned by an entity as a measurement of its business activity in the state, and to allocate the nonbusiness income,[6]

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[5] This does not prevent double taxation because other states can have different apportionment and allocation schemes; however, it does prevent a state from asserting a full tax against entities domiciled in the state while also imposing a tax on entities not domiciled in the state, mitigating the imposition of discriminatory taxation.

[6] Nonbusiness income is income not directly related to the business operations of an entity (*e.g.*, certain investment income) which has been addressed by this Court in *MeadWestvaco Corp. v. Illinois Dep't of Revenue*, 553 U.S. 16 (2008); *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992); and *F.W. Woolworth Co. v. Taxation & Revenue*, 458 U.S. 354 (1982).

generally to the State where the entity is domiciled.[7] An entity's domicile is less important for purposes of business income, because a state with general jurisdiction apportions that income to satisfy internal consistency requirements. Conversely, non-business income is generally allocated to the state of the entity's domicile.[8]

For the trust at issue in this case, North Carolina does not have general jurisdiction for taxation purposes because the trust is a separate legal entity from the trust's beneficiary(s). With no general jurisdiction, North Carolina is limited to taxing such a trust based on the specific activity conducted by the trust in the State. Unlike asserting jurisdiction over rental income received from rental properties in North Carolina, which is subject to the State's specific jurisdiction, North Carolina is relying solely on the location of a beneficiary to the trust, and not the activity conducted by the trust which is generating taxable income. This is clearly insufficient for Due Process Clause purposes.

### A. General Tax Jurisdiction Must Be Limited To An Entity's Domicile.

Although not directly related to the imposition of a tax, this Court has limited many states' broad long-arm statutes asserting general jurisdiction pursuant

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[7] Some states have differences in the allocation of nonbusiness property, such real estate which may be allocated based on the property's location rather than an entity's domicile. The tax would still need to be internally consistent, regardless.

[8] "The State distinguishes between business income, which it apportions between it and other States for tax purposes, and nonbusiness income, which it generally allocates to a single State on the basis of commercial domicile." *F.W. Woolworth Co. v. Taxation & Revenue*, 458 U.S. 354, 357 (1982).

to the Due Process Clause. In another case involving North Carolina, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), this Court specifically reined in the State when it attempted to assert general jurisdiction because the defendant's connection with the State was too limited. While the case dealt with a tragic bus accident involving a North Carolina youth playing soccer in France, this Court unanimously held the petitioners lacked "continuous and systematic general business contacts" requisite for North Carolina to entertain a suit that was unrelated to the contacts the petitioners had with the State. *Id.* at 928 (citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)).

The North Carolina Department of Revenue appears to, yet again, be pushing the boundaries of the State's jurisdictional reach over non-domiciled entities, and in doing so, is relying on the "stream-of-commerce" theory that this Court rejected in *Goodyear Dunlop*. *Id.* at 927. The flow of income from a trust may ultimately be to its beneficiaries, but the mere fact a trust has a beneficiary in the State does not equate to the trust being domiciled in that State. "Single or occasional" acts of a trustee having contacts with a beneficiary in North Carolina are insufficient for the State to assert general taxing jurisdiction over the trust based on a beneficiary's domicile, just as they were deficient in *Goodyear Dunlop*. *Id.* at 924.

A trust is a separate legal entity from its beneficiaries. A trust's contacts with the forum state and whether the contacts are on a continuous and systematic basis are the most relevant factors for determining the appropriate forum jurisdiction to impose a tax, not the status of one or more beneficiaries of a trust who could be located anywhere in the world. Where the trust

conducts business is a "purposeful activity" of the trust; the domicile of the beneficiaries is not, however, something a trust can directly control and does not demonstrate that the trust purposely availed itself to conduct business in North Carolina.[9]

In 2014, this Court further clarified the issue of general jurisdiction, which is relevant to general tax jurisdiction, in two cases. The Court in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), justifiably expressed concerns relating to California's assertion of general jurisdiction over a foreign entity with very limited activity in the State. *See Daimler AG*, 571 U.S. at 139. The Court noted that if California had general jurisdiction over such an entity, then so would practically every other state. *Id.* "Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurances as to where that conduct will and will not render them liable to suit." *Id.* at 139 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks omitted). The same holds true for the authority for a state and its local jurisdictions to have broad taxing authority over an entity, absent specific tax jurisdiction, that should be limited to an entity's home state location.

This Court also decided *Walden v. Fiore*, 571 U.S. 277 (2014), which limits a state's general tax jurisdiction. Citing *Burger King*, the Court noted that "the relationship must arise out of contacts that the defendant himself creates with the forum State."

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[9] *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 886 (2011). "At no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws." *Id.* at 887.

*Walden*, 571 U.S. at 284. In this case, the activities of a current beneficiary are being used inappropriately to assert that the trust, which is a separate legal entity, has sufficient contacts with North Carolina to be subject to the State's general jurisdiction. As noted in *Helicopteros*, "[the] unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros*, 466 U.S. 408, 417. While the beneficiary's residency is undisputed and the beneficiary clearly benefited from protections provided by the state of North Carolina, the trust, as a separate legal entity from the beneficiary, reaped no benefits or protections from the State.

This Court would greatly enhance the understanding of Due Process Clause limitations for state and local taxes by making it clear that general tax jurisdiction is restricted to the location where a taxpayer is domiciled. Although the assertion that a state may not exercise general taxing jurisdiction over a non-domiciled entity may seem novel, *amicus* is by no means contending that states are precluded from taxing non-domiciled entities based on the entity's specific activities within the state. In other words, a state can clearly assert jurisdiction to impose a tax based on the entity's specific activities within the state. This Court is now in a position to provide clear guidance as to types of activities that may be taxed and when an entity's activities within the state have risen to a level that would allow that state to impose such a tax under the Due Process Clause.

### B. Specific Tax Jurisdiction Requires The Entity To Actually Be Conducting Business In The Forum Jurisdiction.

In *Wayfair,* this Court recently addressed what constitutes substantial nexus for Commerce Clause purposes,[10] removing the physical presence requirement for states to require out-of-state sellers to collect and remit sales and use taxes. *See Wayfair*, 138 S. Ct. 2080, 2099. Under the Due Process Clause, even if a state does not have general taxing jurisdiction over an entity, as discussed above, if the entity has purposely directed business activity towards the forum state, the entity could nonetheless have sufficient minimum contacts for due process purposes. An entity that purposely directs its business activity to purchasers in the forum state would likely be required to collect and remit that state's sales and use tax. A similar result could also hold true for states imposing a corporate income tax, whether it is solely imposed on the entity or on a combined group of related entities whose operations are unitary with the business activity conducted in the forum state.[11]

This Court addressed the issue of specific jurisdiction in *J. McIntyre Mach., Ltd.,* 564 U.S. 873. In

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[10] U.S. Const. Art. I, Sec. 8, cl. 3.

[11] As noted by this Court in *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425 (1980), "the linchpin of apportionability in the field of state income taxation is the unitary-business principle ... in order to establish that [income] is not to an apportioned tax in Vermont, the income [must be] earned in the course of activities unrelated to the sale of petroleum products in that State." *Id.* at 439. The activities need to be unitary: "Where the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State, due process considerations might well preclude apportionability, because there would be no underlying unitary business." *Id.* at 442.

*J. McIntyre*, the Court was asked to determine whether a foreign entity was subject to the jurisdiction of a New Jersey state court where the entity was not present in a State at the time of the accident giving rise to the specific lawsuit. *See J. McIntyre*, 564 U.S. at 877. The foreign entity at the center of this case was a British manufacturer of scrap metal machines, which sold its machines into the U.S. market through a third-party distributor. *Id.* at 878. The foreign entity did not direct advertisements or otherwise solicit U.S. sales. *Id.* at 886. Through a third-party distributor, one of its machines ended up in a New Jersey facility, and that machine caused the injury that resulted in the lawsuit. *Id.* at 886-87.

Considering the facts in *J. McIntyre*, the Court focused on the foreign manufacturer's specific activities within New Jersey to determine whether it was subject to the specific jurisdiction of the State. *Id.* at 886-87. In other words, the Court focused on whether activities of the foreign manufacturer in New Jersey were sufficiently related to the injury giving rise to the lawsuit. *Id.* Finding that "the defendant does not have a single contact with New Jersey short of the machinery in question ending up in the State," the Court held that it had not "purposefully availed itself to the New Jersey market." *Id.* at 886.

*J. McIntyre* is important for two reasons. First, while a state may be precluded from asserting jurisdiction over an entity generally, there may be situations where an entity may be subject to a state's jurisdiction for a limited or specific purpose. As discussed above, only the state of domicile should have general taxing jurisdiction over an entity—meaning the entity can be subject to the full extent of the state's taxing authority. *Amicus* is not attempting to forestall

the states' ability to tax non-domiciliary entities because specific tax jurisdiction would allow the states to impose specific taxes upon such entities based on the specific activities of a particular entity within the state.

Second, *J. McIntyre* also highlights that it is the entity's activities, as opposed to the activities of a third-party, that must be considered when determining whether a state has jurisdiction. At no point in the Court's analysis in *J. McIntyre* did the Court look to the activities of the third-party distributor to determine whether J. McIntyre's activities gave rise to New Jersey being the appropriate forum to address that case. As discussed above with respect to general taxing jurisdiction, it is the taxpayer entity's activities, as opposed to some other third-party's activities, that must be considered. The same reasoning applies with respect to the determination of whether an entity is subject to the specific taxing jurisdiction of a non-domiciliary state. The failure to uphold the decision of the North Carolina court in this case involving a trust would eviscerate completely this requirement.[12]

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[12] Several other states have come to similar conclusions. In *Griffith v. ConAgra Brands, Inc.*, 229 W. Va 190 (2012), the Supreme Court of Appeals of West Virginia Supreme held an assessment against a licensor of products sold by others in the State did not "[satisfy] purposeful direction under the Due Process Clause." *Id.* at 200 (internal quotation marks omitted). The Supreme Court of Oklahoma also held "due process is offended by Oklahoma's attempt to tax an out of state corporation that has no contact with Oklahoma other than receiving payments from an Oklahoma taxpayer who has a bona fide obligation to do so under a contract not made in Oklahoma." *Scioto Ins. Co. v. Okla. Tax Comm'n*, 279 P.3d 782, 784 (2012). And, the Maryland Court of Appeals rejected the use of an "enterprise theory" to assert related entities would create sufficient contacts for due process

Such a ruling would also remove all semblance of due process requirements as they relate to state and local taxation. Although this case is specific to the income taxation of a trust, its implications will be far reaching. This Court should take this opportunity to provide guidance to entities as well as to the state and local jurisdictions regarding what the Due Process Clause requires in this area. Highlighting the differences as to how a state can tax an entity depending on whether it has general tax jurisdiction versus specific tax jurisdiction would benefit both taxpayers and state and local governments.

*Amicus* strongly encourages this Court to consider aligning its requirements regarding the jurisdiction to impose state and local taxes to the general and specific jurisdiction requirements recently laid out by this Court as discussed above. The ability of a state or local jurisdiction to impose tax on a non-domiciliary entity would in no way be foreclosed. Rather, such an entity's activities directed at a particular state or local jurisdiction would need to be considered more closely to determine if those activities were sufficient to satisfy the specific jurisdiction requirements prescribed by the Due Process Clause.

## CONCLUSION

The Due Process Clause requires sufficient "minimum contacts" with a state or locality before an entity can be subject to the state or local government's taxing authority. This Court's recent Due Process Clause cases looking at whether an entity was subject to a state's jurisdiction should be used to guide taxpayers

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purposes. *Gore Enter. Holdings, Inc. v. Comptroller of the Treasury*, 437 Md. 492, 509 (2013).

and state and local governments on when a jurisdiction can assert its taxing authority over non-domiciliary entities.

Respectfully submitted,

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